III.

The Order Assessing the Costs Against Respondents Was Proper.

The Argument that the Order assessing the costs against the respondents was not in conformity with the mandate is completely without merit for the reason that the mandate referred to the costs on appeal and had no reference to the costs in the District Court.

IV.

The Respondents Were Liable for the Unnecessary Expenses Incurred by Them.

The contention that the respondents were not liable because they were mere intervenors and not petitioning creditors is completely without merit for the reasons urged in the petition which cited 2 C. J. S. Sec. 118 and is squarely in point. See also *First Nat. Bank* v. *Southern Oil Co.*, 86 F. (2) 33; *In the Matter of Lakor,* 142 Fed. 760.

V.

The Fees of the Trustees and His Counsel Were Taxable Against the Creditors Who Caused Their Appointment To Be Made.

This subject matter was fully discussed in the Petition (pp. 23-35). The cases which they cite do *not* involve complete lack of jurisdiction of parties and subject matter. We may concede that there is a conflict of opinion on this point in the various Courts, and this is added reason for the issuance of the Writ.

It is difficult to follow the reasoning of the respondents. On the one hand, they cite authorities to the effect that the fees of the Trustee and his counsel are not chargeable as costs and where a suit is dismissed for lack of jurisdiction, the Court may not even assess costs. On the other hand, they resist petitioners' efforts to obtain a review from that part of the Order which assessed the costs of administration against the funds collected. The attempt to justify the allowance to the Trustee and his counsel and the taxing thereof against the fund on the ground that there has been an "operating profit" is absurd. This operating profit was derived by depriving the bondholders of the payment of their interest and without setting up a fund for the payment of taxes. Were it not for the wrongful appointment of the Trustee, these funds would have been applied against the debt due to the bondholders and they, therefore, sustained a loss.

That a Federal Court may not charge the expense of administration to the funds where it completely lacked jurisdiction was clearly held in *Lion Bonding Co.* v. *Karatz*, 262 U. S. 640. At page 642, the Court said:

> "As the lower federal courts *lack jurisdiction*, they are necessarily *without power to make any charge upon, or disposition of, the assets within their respective districts.* Even where the Court which appoints a receiver had jurisdiction at the time, but loses it, as upon supervening bankruptcy, the first court cannot thereafter make an allowance for his expenses and compensation. He must apply to the bankruptcy court. *Where a case is dismissed for want of jurisdiction as a federal court, there is not even power to award costs against the defeated party.* The case at bar is unlike *Palmer* v. *Texas*, 212 U. S. 118, 132, upon which the receivers rely. In that case, the costs and expenses of a receiver erroneously appointed by the federal court were directed to be paid out of funds realized in that court. There the Circuit Court *had jurisdiction*

as a federal court; but the decree appointing the receiver was reversed, because it was erroneous." (Italics supplied.)

This was reiterated in *Gross* v. *Irving Trust Co.*, 289 U. S. 342, 345.

That there is an "*exception*" to the rule that a Court may charge the funds with the expense of administration in cases *where jurisdiction was completely lacking* was also held by this Court in *Burnite Coal Co.* v. *Riggs*, 274 U. S. 208.

It is of no importance whether the Court which lacked jurisdiction was a court of bankruptcy or a court of equity as the underlying principle is not the particular tribunal but the jurisdiction of the court.

VI.

The Courts Are Not in Accord That Restitution May Be Ordered in a Case Dismissed for Lack of Jurisdiction.

The argument under Point VI of the respondents is but a repetition of argument under Point V, and we concede there is a *conflict* of decisions on this point and this is an added reason why the Writ should be issued.

Conclusion.

The Record presents a case where after the reversal of a decree reorganizing the debtor under the Bankruptcy Act, with directions to dismiss the proceedings for lack of jurisdiction of the parties and the subject matter, and ousting the Trustee from the administration of the Estate, the Court proceeded, in violation of the mandate, to direct the Trustee to continue to exercise his functions. It directed the tenants to continue the payment of rent to the ousted Trustee and ordered the owner of the equity to

turn over rents, collected thereafter, to the non-existent Trustee. Yet, the same reviewing Court which ousted the Trustee on the previous appeal for want of jurisdiction now affirms the Order on the ground that it had a right to modify its opinion. There is no precedent for such law. Under such a decision, there would be no finality to any judgment on review. Such a case warrants the issuance of the discretionary writs by this Court to review the decision of the Court of Appeals which is in conflict with the decisions of this Court and the decisions of other Circuits.

Respectfully submitted,

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